UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

TROY ANTHONY DAVIS,	)	
	)	
Petitioner,	)	
	)	
	)	
v.	)	**CV 401-290**
	)	
	)	
FREDERICK HEAD, Warden,	)	
Georgia Diagnostic Prison,	)	
	)	
Respondent.	)	
	)	

ORDER

Before the Court is petitioner's motion for an evidentiary hearing (Doc. 38), respondent's response thereto (Doc. 39) an petitioner's reply (Doc. 41). Specifically, petitioner seeks an evidentiary hearing with respect to four of his seventeen claims in this federal habeas corpus action: Claim IV (state misconduct); Claim V (conflict of representation at motion for new trial and on appeal); Claim VI (ineffective assistance of counsel); and Claim VIII (petitioner's absence from critical stage of trial). Respondent has opposed petitioner's motion in its entirety. For the following reasons, the Court DENIES petitioner's motion for an evidentiary hearing (Doc. 38). As discussed herein, the Court also DENIES petitioner's request for oral argument on the instant motion (Doc. 42) and DENIES petitioner's motion for expert assistance (Doc. 28).

I. Background

On direct appeal, the Georgia Supreme Court described the factual background of this case as follows:

> At midnight on August 18, 1989, the victim, a police officer, reported for work as a security guard at the Greyhound bus station in Savannah, adjacent to a fast-food restaurant. As the restaurant was closing, a fight broke out in which Davis struck a man with a pistol. The victim, wearing his police uniform--including badge, shoulder patches, gun belt, .38 revolver and nightstick--ran to the scene of the disturbance. Davis fled. When the victim ordered him to halt, Davis turned around and shot the victim. The victim fell to the ground. Davis, smiling, walked up the stricken officer and shot him several more times. The officer's gun was still in his holster.
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> The victim wore a bullet proof vest, but the vest did not cover his sides and the fatal bullet entered the left side of his chest, penetrated his left lung and aorta, and came to rest at the back of his chest cavity. The officer was also shot in the left check and the right leg.
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> The next afternoon, Davis told a friend that he had been involved in an argument at the restaurant the previous evening and struck someone with a gun. He told the friend that when a police officer ran up, Davis shot him and that he went to the officer and "finished the job" because he knew the officer got a good look at his face when he shot him the first time.
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> After his arrest, Davis told a cellmate a similar story.

Davis v. State, 263 Ga. 5, 5-6, 426 S.E.2d 844,846 (Ga. 1993).

The Court adds the following facts to place in context some of the evidence presented in support of petitioner's motion for an evidentiary hearing. The police officer who was killed was "Officer McPhail." On the night that Officer McPhail was killed, two other shootings occurred at a pool party in "Cloverdale." A young man named Michael Cooper was shot in the face while riding in a car in front of the party. Another young man named Sherman Coleman was shot by gunfire coming from the car. Petitioner, who was present at the Cloverdale party, was convicted of shooting Michael Cooper. The bullet removed from Michael Cooper's check was the same type of bullet used to shoot Officer McPhail, and allegedly came from the same gun.

Officer McPhail was shot in a part of town called "Yamacraw" outside of a Burger King. Officer McPhail was shot following an altercation between a man named Larry Young and petitioner, Sylvester ("Red") Coles and Darrell ("D.D.") Collins.

This Court previously has set forth the procedural background in this case as follows:

> Petitioner was indicted in Chatham County, Georgia on November 15, 1989 for the murder of Officer Mark Allen McPhail, obstruction of Officer McPhail, aggravated assault and possession of a firearm during the commission of a felony. Petitioner was tried by jury on August 19-30, 1991 and was found guilty on all counts. Petitioner was then sentenced to death for the murder of Officer McPhail. Petitioner filed several motions for new trial, which were denied in March of 1992. The Georgia Supreme Court affirmed petitioner's conviction and death sentence in 1993. See

Davis v. State, 263 Ga. 5, 426 S.E.2d 844 (1993).

On March 5, 1994, petitioner filed a petition for habeas corpus. At a status hearing on July 20, 1995, the court scheduled an evidentiary hearing for November 21, 1995. On August 28, 1995, petitioner's original counsel filed a notice of withdrawal and petitioner's new counsel moved to continue the November 21 hearing. On October 19, 1995, the habeas court denied the request for continuance. Petitioner then filed an interlocutory appeal. In an Order dated May 28, 1996, the Georgia Supreme Court reversed the habeas court's denial. See Davis v. Thomas, 266 Ga. 835, 471 S.E.2d 202 (Ga. 1996).

On November 6, 1996, petitioner filed an amended petition for habeas corpus, alleging fifteen claims for relief. On December 16, 1996, the state court held an evidentiary hearing. Unrestricted in the type of evidence he could present, petitioner presented five witnesses and thirty-three affidavits.

On September 9, 1997, the state court denied petitioner's state court petition for habeas corpus. The Georgia Supreme Court affirmed the denial of state habeas corpus relief on November 13, 2000. See Davis v. Turpin, 273 Ga. 244, 539 S.E.2d 129 (Ga. 2000). On December 15, 2000, the Georgia Supreme Court denied petitioner's motion for reconsideration. On October 1, 2001, the United States Supreme Court denied certiorari.

Petitioner then filed his federal habeas corpus petition on December 14, 2001.

Doc. 32 at 1-3.

II. Motion for an evidentiary hearing

Petitioner seeks an evidentiary hearing in order to "present evidence before this Court in support of the factual allegations" set forth in his petition for a writ of habeas corpus. Doc. 38 at 1. He contends that such a hearing is necessary because the evidence he offered at the state habeas corpus hearing, and additional evidence presented for the first time in this proceeding, raises a "convincing claim of innocence." See Doc. 41 at 1-2. As he has done at trial and during all subsequent state court proceedings, petitioner advances his theory that Sylvester "Red" Coles, and not petitioner, shot Officer McPhail. See Doc. 38 at 9.

Petitioner points to the following evidence as grounds for an evidentiary hearing:

A. Evidence presented during state court proceedings

At the state habeas evidentiary hearing, petitioner offered the following affidavits, which the state court agreed to take under consideration. See Davis v. Turpin, 94-v-162 December 16, 1996 H'rg Tr. At 81-99.[1]

1. Affidavit of Joseph Washington

At petitioner's trial, Joseph Washington testified that he saw Red Coles assault Larry Young and shoot Officer

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[1] The state court did not specifically refer to, and apparently did not rely on, any of these affidavits in ruling on petitioner's habeas corpus petition, as the state court found that the claims in support of which the affidavits had been offered were procedurally barred. See Davis v. Turpin, 94-v-162, Sept. 9, 1997 Order.

McPhail. At the state habeas corpus hearing, petitioner offered a December 6, 1996, affidavit in which Mr. Washington reiterated that he was positive that Red Coles shot Officer McPhail, and stated that Red Coles was wearing a white shirt with a batman print on it at the time of the shooting. See Doc. 38, App. 37. Petitioner did not call Mr. Washington to testify at the state habeas corpus hearing.

2. Affidavit of Tonya Johnson

At petitioner's trial, Tonya Johnson testified that on the night that Officer McPhail had been shot, she and her friend Anita Dunham were walking toward the Burger King when they were stopped by Red Coles and his friend Terry. Coles asked if he could walk with the two women. When the four of them approached the scene of the shooting, however, Coles did not want to go close to the scene. The group turned around and walked away, but Coles directed Ms. Johnson to return to the scene to see if the police were present. Ms. Johnson returned to the scene, asked the officers what had happened, and learned that an officer was dead. She then reported this information to Coles and Terry. Ms. Johnson further testified at trial that Coles was nervous from the moment she saw him that night. Finally, Ms. Johnson testified that she had seen Coles earlier that night at the Cloverdale party.

At the state habeas corpus hearing, petitioner offered a December 6, 1996, affidavit in which Ms. Johnson stated that when she saw Red and Terry that night, each of them had a gun. Red asked her to hold the guns, but Ms. Johnson refused. Red then took the guns to an empty house and put the guns to an empty house and put the guns inside a screen door. He told Ms. Johnson that he wanted to make sure that she did not tell the police about the guns. Ms. Johnson "did not testify about the guns at Troy's trial because she was afraid of what Red would do to [her] if [she] did." See Doc. 38, App. 43. Petitioner did not call Ms. Johnson to testify at the state habeas corpus hearing.

3. Affidavit of Kelvin McQueen

In October 1989, Chatham County inmate Kevin McQueen gave a statement to Savannah Police Detective Ramsey that petitioner had confessed to having shot Officer McPhail. At petitioner's trial, Mr. McQueen testified regarding such confession.

At the state habeas corpus hearing, petitioner offered a December 6, 1996 affidavit of Kevin McQueen in which Mr. McQueen said that petitioner never confessed to Officer McPhail's shooting, but rather that Mr. McQueen made up the story of petitioner's confession after a jailhouse altercation between petitioner and Mr. McQueen. See Doc. 38, App. 48. Petitioner did not call Mr. McQueen to testify at his state habeas corpus hearing.

4. Affidavit of Joseph Blige

In a pretrial statement, Joseph Blige stated that he, Michael Cooper, Lamar Brown, Mark Wilds and Benjamin Gordon were at the Cloverdale party on the night Officer McPhail was shot. When these five men were leaving the party in an automobile, four or five other men were behind some bushes, and one of them started shooting. Mr. Blige did not know how many of the men joined in the shooting, but "they shot at a steady pace." Michel Cooper was shot in the face.

In a December 1, 1995 affidavit, Mr. Blige said that when he was at the Cloverdale party, neither he nor any of the men he was with "had any words or any problem with Troy Davis." Mr. Blige further stated that when he and his friends were leaving the party, Michael Cooper yelled something out of the car window and the shooting started. Mr. Blige heard more than one weapon being fired. Mr. Blige believed that at least one of the weapons was "an automatic." The car was hit at least six times, and there were different sized bullet holes in the car. See Doc. 28, App. 49. Petitioner did not call Mr. Blige to testify at his state habeas corpus hearing.

5. Affidavit of April Hester

At the state habeas corpus hearing, petitioner offered a November 30, 1995, affidavit in which Ms. Hester stated that she was a hostess of the Cloverdale party on the night in question. She remembers that Red Coles was at this party and was drinking. Ms. Hester did not see him there after 10:00 p.m., because she want in back of the house and Red went around front. Some time after midnight, Mark Wilds, "Porky" and "some of the others" "started making trouble" and Ms. Hester asked them to leave. She went to the front of the house when they got in their car and left. A few minutes later, they drove by the house and Ms. Hester heard shots coming from the car. They drove by again, fired more shots, and shot Sherman Coleman.

When the police came to the party, Ms. Hester heard over an officer's walkie-talkie that an officer had been shot that night. The police left right away. Ms. Hester then drove to Yamacraw to see what had happened. She saw Red Coles speaking with Tonya Johnson and acting nervous and upset. That night, Ms. Hester was brought to the police station to answer questions about the shooting of Officer McPhail. The next day, the police asked Ms. Hester to give a statement about the shooting of Sherman Coleman. She did not learn until some time later that Michael Cooper also had been shot that night. See Doc. 38, App. 44. Petitioner did not call Ms. Hester to testify at the state habeas corpus hearing.[2]

6. Affidavit of Lamar Brown

At petitioner's state habeas corpus hearing, petitioner presented a November 2, 1995 affidavit of Lamar Brown. In this affidavit, Mr. Brown stated that he went to the Cloverdale party with Michael Cooper, Mark Wilds, Michael Wilds and Joseph Blige. Neither Mr. Brown nor the people he was with that night "had any kind of conflict or argument with Troy

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[2] As will be discussed below, Ms. Hester provided a subsequent affidavit on July 7, 2002. See Doc. 38, App. 45.

Davis at the party. None of us ever had any problem with Troy Davis." See Doc. 38, App. 50.

B. Evidence presented for first time in federal habeas proceeding

The following affidavits have been presented for the first time in the instant federal proceeding.

1. August 17, 2001 affidavit of Monty Holmes

Three days after Officer McPhail was shot, Monty Holmes told the police that petitioner had confessed to having shot a police officer in the chest. See Doc. 38, App. 22. At petitioner's preliminary hearing Mr. Holmes gave the same testimony. Mr. Holmes, however, did not testify at petitioner's trial.

Petitioner now offers an August 17, 2001 affidavit of Mr. Holmes, in which Mr. Holmes states that when the police first questioned him about Officer McPhail's shooting, he told them that he knew nothing about it. The police continued to question him, he was scared, and finally he said what they wanted to hear, that petitioner had confessed to having shot Officer McPhail. When Mr. Holmes went to court for the preliminary hearing, he felt compelled to repeat the substance of his statement, so he did. Mr. Holmes, however, did not want to testify at trial because petitioner had never confessed to him. Mr. Holmes therefore dodged a subpoena and did not testify at petitioner's trial. See Doc. 38, App. 23.

2. November 29, 2000 Affidavit of Dorothy Ferrell

On August 19, 1989, Dorothy Ferrell said that she had seen the man who shot Officer McPhail as she was coming down the steps of the Thunderbird Motel, and that she would recognize the shooter if she saw him again. See Doc. 38, App. 26.

On September 5, 1989, Ms. Ferrell identified petitioner as the person who had shot Officer McPhail. She

said that she had seen the shooting from about ten or fifteen feet away as she was coming down the steps of Thunderbird. See Doc. 38,App. 25.

At petitioner's trial, Ms. Ferrell testified that she had identified petitioner in a pre-trial photographic lineup. She identified petitioner in court as the man who had shot Officer McPhail. Defense counsel cross-examined Ms. Ferrell as to whether she could see the shooting from the Thunderbird stairwell, under poor lighting conditions. Defense counsel asserted at trial that Ms. Ferrell's testimony was unworthy of belief.

After the close of evidence but before closing arguments, the wife of petitioner's trial counsel received a call at home from a woman who identified herself as Ms. Ferrell. This woman stated that she had testified at petitioner's trial, and that a year earlier, someone from the District Attorney's office had come to see her when she was in jail. The woman said that she was told that this person from the District Attorney's office would help her if she would testify in petitioner's case. The woman said that everything she had testified to at petitioner's trial was a lie, and that she wanted petitioner's counsel to know that she had fabricated her testimony.

The next morning, petitioner's trial counsel moved for a continuance until Ms. Ferrell could be produced. The assistant district attorney then advised petitioner's counsel that he had received correspondence from Ms. Ferrell within the previous year. The assistant district attorney stated that he had written back that he was in no position to help Ms. Ferrell, but that he appreciated her courage and willingness to testify. The trial court then granted petitioner's motion for a continuance.

Ms. Ferrell was apprehended and brought into court. She denied having called trial counsel the night before and denied having anyone else make such a call on her behalf. Ms. Ferrell further testified that she believed the prosecutor would help her because she was a witness in petitioner's case.

The state then proffered testimony that the district attorney had not promised Ms. Ferrell anything and did not, in fact, assist her. Petitioner's counsel moved for a mistrial, but chose not to recall Ms. Ferrell to the stand.

Petitioner now presents a November 29, 2000, affidavit of Ms. Ferrell in which Ms. Ferrell states that she did not see who shot Officer McPhail, she just heard the gunshots while she was in the stairwell of the Thunderbird Motel. By the time she exited the stairwell, the shooting had stopped and more than two people were running away. She said that on the night of the shooting, she was brought into the police station for questioning and told that she could not leave until she made a statement. She felt as if the police wanted her to say that she had seen the shooting and to sign a statement, so that is what she did. A little while later, a police detective showed Ms. Ferrell a picture of petitioner and told her that other witnesses had identified petitioner as the shooter. Ms. Ferrell told the detective that petitioner was the shooter, even though she had not seen who the shooter was. At trial, she repeated what she had said in her earlier statements to the police.

Ms. Ferrell said that she did not make the phone call to defense counsel's home during petitioner's trial, but a friend of hers did. Ms. Ferrell also said that she did not see petitioner in the courtroom during her second trial appearance when she was asked about the phone call. See Doc. 38, App. 27.

3. 2002 unsworn affidavit of Harriett Murray

In an August 19, 1989 police statement, Harriett Murray stated that she sent Larry Young out to get cigarettes and beer, and that when Larry returned, "one guy" was "fussing at [Larry]" and then two more came up from a nearby bank. "One of the guys said" said, "You don't know me, don't walk away from me, I'll shoot you," and started digging into his shirt and pulling out a gun. Larry Young kept walking away and "they hit Larry in front of the van" in

the Burger King drive-through. Officer McPhail came running out and the guy with the gun shot Officer McPhail several times. Ms. Murray decsribed the man with the gun as having "a narrow face, with high cheekbones, medium-skinned, with a white shirt," dark-colored pants, a fade-away haircut, between 24 an 30 years old, 130 pounds, and four inches taller than Officer McPhail. See Doc. 38, App. 4.

In an August 24, 1989 police statement, Ms. Murray identified Red Coles as one of the men present at the incident but not as the shooter.

At a preliminary hearing, Ms. Murray identified petitioner as a person who was "at the police shooting." At trial, Ms. Murray testified that the man in the white shirt hit Larry in the head with a gun and shot Officer McPhail. She testified that petitioner "looked like the guy that had hit Larry and shot the police." Trial Tr. at 865.

Petitioner now presents an unsworn affidavit of Ms. Murray, purportedly dated October 14, 2002,[3] in which Ms. Murray states that the man following Larry started digging in his pants for a gun and slapped Larry on the side of the face with the gun. Ms. Murray then ran to the Burger King for help. She saw the man who was arguing with Larry shoot the police officer. See, Doc. 28, App. 29.

4. October 11, 2002 affidavit of Larry Young

In an August 19, 1989 police statement, Larry Young stated that when he was returning from the liquor store with beer, "a guy" started picking on him and asking him for a beer. Two more men than approached. The three men cornered Mr. Young. Mr. Young was paying attention to the

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[3] A Georgia Resource Center attorney and paralegal have stated in sworn affidavits that they presented Ms. Murray's affidavit to Ms. Murray on October 14, 2002, and that she read it, acknowledged its accuracy, and signed it, but did not have time to have it notarized. See Doc. 38, Apps. 30, 31.

man who had been picking on him. One of these three men (Mr. Young was not certain which one) hit Mr. Young, and Mr. Young ran to the Burger King looking for help. Mr. Young did not see the shooting of the police officer. Mr. Young described one of the men as wearing a white t-shirt with a print on it and a white hat. He described another of the men as wearing a yellow tank top, about 20-21 years old, with short hair, about 5'9", 158 pounds, with no facial hair. He thought that the man in the yellow tank top was the one that was "constantly on" him. See Doc. 38, App. 5.

At a preliminary hearing, Mr. Young testified that his attention had been focused on the man who was picking on him. Mr. Young also testified that he couldn't see too much because the light was in his face and he had already consumed seven or eight beers that night.

At petitioner's trial, Larry Young testified that he did not know who had assaulted him, and that he couldn't get a good look at the men who were not arguing with him.

Petitioner now presents an October 11, 2005 affidavit of Mr. Young in which Mr. Young said that after Officer McPhail had been shot, other police officers treated him like a criminal and would not treat his injuries. Mr. Young told the police officers that he did not know what anyone looked like or who did what. The police kept pressing Mr. Young for answers. The police suggested answers and Mr. Young gave the police what they wanted and signed the typed papers that they gave to him without reading them. Mr. Young never has been able to make sense of what happened that night. See Doc. 38, App. 32.

5. October 12, 2002 affidavit of Antione Williams

In an August 19, 1989 police statement, Antione Williams stated that, from his car in the Burger King parking lot, he had seen three men following one man. The man with the gun then slapped the one man across the head with the gun. The man with the gun was trying to get to the gun back into his pants, but could not, and he shot the police officer.

The other two men ran off. Mr. Williams said that he did not know if he could identify the shooter. See Doc. 38, App. 6.

In an August 30, 1989 police statement, Antione Williams stated that he was sixty percent sure that petitioner was the person who shot Officer McPhail. Mr. Williams also said that the man who did the shooting was the same man that slapped Larry Young in the head with the gun. See Doc. 38, Ap. 33.

At petitioner's trial, Mr. Williams identified petitioner in open court as the person who shot Officer McPhail.

Petitioner now presents an October 12, 2002 affidavit of Mr. Williams in which Mr. Williams said that when he saw the officer go down, he couldn't really tell what was going on due to the tint of the windows in his car. When police officers questioned Mr. Williams on the night of the shooting, Mr. Williams said that he did not know what had happened and could not identify with any certainty who had shot Officer McPhail. Mr. Williams signed the statement that the police officers gave him, even though he cannot read.[4] When Mr. Williams identified petitioner as the shooter at petitioner's trial, Mr. Williams was "totally uncertain" as to whether petitioner was the one who had shot the officer. Mr. Williams has no idea what the person who shot Officer McPhail looks like. See Doc. 38, App. 34, Ex. A.

6. August 8, 2001 affidavit of Anthony Hargrove

Petitioner presents an August 8, 2001 affidavit of Anthony Hargrove in which Mr. Hargrove stated that Red Coles once told him "that [Red] shot a police officer and that a guy named Davis took the fall for it." See Doc. 38, Appendix 41.

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[4] An attorney and paralegal for the Georgia Resource Center read the October 12, 2002 affidavit to Mr. Williams before he signed it. See Doc. 38, Apps. 34, 35.

7. August 18, 2001 affidavit of Shirley Riley

Shirley Riley stated in an August 18, 2001 affidavit that Red Coles told her that he shot the police officer in 1989 but it was an accident. Ms. Riley further stated, "Maybe Sylvester was just trying to impress me. I don't know for sure who actually shot the officer." See Doc. 38, App. 40.

8. August 20, 2001 affidavit of Darold Taylor

Darold Taylor stated in an August 20, 2001 affidavit that after hearing rumors that Red Coles had shot Officer McPhail, he raised the issue with Red:

> One day when I was in the parking lot of Yamacraw drinking beers with Red, I told him about how I'd heard that he was the one who killed the officer. Red told me to stay out of his business. I asked him again if he killed the officer and Red admitted to me that he was the one who killed the officer, but then Red told me again to stay out of his business. He sounded like he was starting to get mad. I didn't ask him anything more about it then and I never brought it up with him after that.

Doc. 28, App. 42.

9. August 17, 2001 affidavit of Gary Hargrove

Gary Hargrove stated in an August 21, 2001, affidavit that he was at the Burger King the night that Officer McPhail got shot. He heard a shot, looked "where the one shot came from," and saw a guy who "looked like Troy Davis" running away. He heard another shot and saw that the guy who was still standing near the police officer "was a guy whose nickname is Red." See Doc. 38, App. 39.

10. October 8, 2002 Affidavit of Abdus-Salam Karim

Abdus-Salam Karim stated in an October 8, 2002, affidavit that he told Red Coles that hew as Troy Davis's cousin and that he had heard what red had been saying about Troy. Red said that Troy had not done anything and that Red had lied to the police when Red told the police "that Troy did it." Red further said that he would tell the truth to the police, that Troy "didn't do anything." See Doc. 38, App. 38.

11. July 10, 2002 Affidavit of Anita Dunham Saddler

In a July 10, 2002 affidavit, Ms. Dunham Saddler stated that when she saw Red Coles and his friend Terry on the night Officer McPhail had been shot, Red and Terry were jumpy, nervous, fidgety and shifty-eyed. Red had a gun stuck into his shorts and was wearing a white shirt. When Tonya Johnson told Red that the police officer had been shot and might be dead, it appeared to Ms. Dunham Saddler that Red knew exactly what had happened. See Doc. 38, App. 46.

12. July 7, 2002 Affidavit of April Hester Hutchinson

In a July 7, 2002 affidavit, April Hester Hutchinson stated that while everything she said in her 1995 affidavit had been correct, she had not mentioned everything she had known about the night that Officer McPhail got shot because she was still scared of Red Coles. She elaborated on her earlier affidavit by stating that when she saw Red Coles speaking with Tonya Johnson on the night Officer McPhail had been shot, she walked up to Red and Tonya. Tonya walked away, and Red asked April to walk with him up to the Burger King so "they won't think that I had nothing to do with it." Ms. Hester started walking with Red, but her mother called for her to come back. Ms. Hester told Red that she had to go, and Red glared at her and told her not to tell anyone

what he had said. Ms. Hester tried to stay away from Red Coles after that time.

When Ms. Hester was brought to the police station on the night of Officer McPhail's shooting, Ms. Hester said that she had seen Red Coles and he had appeared "real nervous," but she did not mention what Red had said to her because she was scared. She did, however, tell her mother later that night about Red's statements. See Doc. 38, App. 45.

13. July 11, 2002 Affidavit of Peggie Grant

In a July 11, 2002, Ms. Grant, the mother of April Hester Hutchinson, stated that on the night that Officer McPhail got killed, she was at her home in Yamacraw and heard the gun shots. She went outside "sometime later" and saw April walking with Red Coles. Red was wearing a white t-shirt. She yelled at April to come back to the house. April then left Yamacraw to go Cloverdale. A few hours later, April called Ms. Grant and said that Red Coles had asked her to walk up to where Officer McPhail had been shot so that the police would think that Red was with her. April also said that after Ms. Grant had called April back to the house, Red had given her a mean look and told her not to say anything about what he had said. See Doc. 38, App. 47.

14. July 11, 2002 Affidavit of Darrell ("D.D.") Collins

On the night that Officer McPhail was shot, D.D. Collins told the police that he had seen petitioner shoot at the people in the car leaving the Cloverdale party. He stated that petitioner used a black gun with a brown handle and a short barrel. Mr. Collins stated that later that night, petitioner and Red Coles were in the Burger King parking lot speaking with a man, and petitioner slapped the man in the head and a police officer came out. When Mr. Collins saw the police officer, he ran to his car and went home. See Doc. 38, App. 20.

At trial, Mr. Collins testified that he did not actually see who fired the shots at the Cloverdale party. He testified

that when he had told the police officers that petitioner had shot at the car, he did so only because he was sixteen years old and the police had been pressuring him. Mr. Collins also testified at trial that after the Cloverdale party, he went to a pool hall. He saw Red Coles with a gun. Red tried to put the gun in Eric Ellison's car, but Mr. Collins moved the gun to the end of the pool hall building because he and Eric Ellison did not want the gun in the car. Red Coles saw where Mr. Collins put the gun. Red Coles was the only person that Mr. Collins saw with a gun that night.

Mr. Collins testified that he saw petitioner slap a man outside the Burger King, but that he did not see petitioner with a gun that night. Mr. Collins testified that when the police officers had questioned him following the shooting, one officer said that if Mr. Collins did not cooperate, he would be imprisoned for ten to twelve years. Mr. Collins testified that he identified petitioner as the shooter in Cloverdale because the police detective asked Mr. Collins if he knew any of the people in the photographs.

Petitioner now presents a July 11, 2002 affidavit in which Mr. Collins stated that he went with petitioner to the Cloverdale party and did not see who fired the gun shots at the party. Mr. Collins also repeated his testimony that he did not see petitioner with a gun that night, Red Coles had a gun at the pool hall, and Red Coles saw Mr. Collins hide the gun in some bushes near the pool hall. Mr. Collins, petitioner and a few other people entered the pool hall, but Red stayed outside and was arguing with a man about beer. Mr. Collins thought that Red was about to get into a fight.

Mr. Collins went into the pool hall, told petitioner that there was going to be a fight, and came back outside with petitioner. Mr. Collins and petitioner started walking behind Red and the man Red was threatening. Mr. Collins then took off running. Mr. Collins did not see petitioner slap the man Red was arguing with. Mr. Collins heard gunshots as he was running away, and left the pool hall.

The next day, many police officers came to Mr. Collins's home and said that they knew that he had been there when the officer had been killed. The police officers took Mr. Collins in for questioning and started yelling at him and telling him that he knew petitioner had fired the shots in Cloverdale and killed Officer McPhail. Mr. Collins said that he did not know that and that he hadn't seen petitioner do anything. The police officers then started telling Mr. Collins that they were going to send him to jail as an accessory. After a couple of hours, Mr. Collins "finally broke down and told them what they wanted to hear." He signed a statement prepared by the police without reading it.

A week later, the police officers questioned Mr. Collins again and gave him another typed statement. Mr. Collins signed that statement without reading it.

Mr. Collins never saw petitioner hit the man that Red was arguing with that night. Mr. Collins lied at trial when he said he had seen petitioner hit him. Mr. Collins did not see who had fired the shots at the Cloverdale party. He testified truthfully when he said as much at petitioner's trial. See Doc. 38, App. 21.

15. September 19, 2002 affidavit of Mary Elizabeth Wells

Petitioner presents a September 19, 2002 affidavit of Mary Elizabeth Wells, a former attorney of the Georgia Resource Center who worked on petitioner's state habeas corpus petition. In her affidavit, Ms. Wells discusses the fact that the Resource Center lost seventy percent of its funding in 1995, and discusses the effect of such de-funding on the Resource Center's ability to handle its caseload, including petitioner's state habeas corpus case.

Ms. Wells stated that, prior to petitioner's state habeas corpus evidentiary hearing, there were numerous witnesses which the Resource Center had not interviewed, but knew it should have, including the affiants of petitioner's newly presented affidavits. She stated the Resource Center had received information in the mid 1990's that Red Coles had

made incriminating statements about his role in Officer McPhail's murder. She admitted that "although we raised all the claims present from the record, we were unable, despite our reasonable attempts to do so, to develop the facts that we believed could be developed through a reasonable investigation." She stated that the information presented in petitioner's newly offered affidavits was available at the time of petitioner's trial. See Doc. 38, App. 58 at 20 ("I have had an opportunity to review affidavits gathered by Mr. Davis' counsel after I left the Resource Center and withdrew from the case. The information contained in these affidavits dealing with manufactured testimony on the part of State witnesses, additional information incriminating Sylvester Coles, and evidence otherwise pointing to Mr. Davis' innocence and/or other mitigating factors is precisely the information I believed was available to support Mr. Davis' constitutional claims for relief-and which was available at the time of Mr. Davis' trial.").

III. AEDPA Standard

The instant petition, filed on December 14, 2001, is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). In passing the AEDPA, Congress "modified the discretion afforded to the district court and erected additional barriers limiting a habeas petitioner's right to discovery or an evidentiary hearing." Isaacs v. Head, 300 F.3d 1232, 1248-49 (11th Cir. 2002). One purpose of the AEDPA "has been to simplify and speed the federal habeas process." Breedlove v. Moore, 279 F.3d 952, 959 (11th Cir. 2002).

> Section 2254(e)(2) of the AEDPA states:
> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
>
> (A) the claim relies on--

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Pursuant to § 2254(e)(2), a petitioner's "failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Michael Williams v. Taylor, 529 U.S. 420, 432, 120 S.Ct. 1479, 1488, 146 L.Ed.2d 435 (2000).

> As recently explained by the Eleventh Circuit:
> The Supreme Court interpreted § 2254(e)(2) in its opinion in Michael Williams v. Taylor, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). The Court considered whether the "failed to develop" language in the opening clause of the provision indicates that the § 2254(e)(2) bar is only applicable when a habeas petitioner has not been sufficiently diligent in his efforts to develop a record in state courts. The Court concluded that this language imported a "threshold standard of diligence," such that the discovery provisions of § 2254(e)(2) only apply if the petitioner was not reasonably diligent in trying to develop the

> factual record while in state court. Id. at 433-34, 120 S.Ct. at 1489. The Court held that "[d]iligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of information available at the time, to investigate and pursue claims in state court." Id. at 435, 120 S.Ct. at 1490. The applicability of the provision is not dependent on "whether those efforts could have been successful." Id. See also Breedlove v. Moore, 279 F.3d 952, 959-60 (11th Cir. 2002) (discussing Michael Williams and application of § 2254(e)(2)).
>
> After discussing the meaning of § 2254(e)(2), the Supreme Court went on to find that an evidentiary hearing was not required with respect to the claims of which Williams was on notice while in state court, but that discovery was required as to a claim of juror and prosecutorial misconduct of which the petitioner had no reason to know while in state courts. Michael Williams, 529 U.S. at 438-445, 120 S.Ct. at 1491-94.

Isaacs, 300 F.3d at 1248. Accordingly, to determine whether a petitioner has "failed to develop the factual basis of [his] claim "in the state court proceedings, the Court first must ask "whether the factual basis was indeed developed in state court, a question susceptible, in the normal course, of a simple yes or no answer." Michael Williams, 529 U.S. 420, 431, 120 S.Ct. 1479, 1487. If the answer is "no," the Court next considers whether the petitioner made a reasonable attempt, in light of information available at the time, to investigate and pursue his claims in state court. Michael Williams, 529 U.S. 420, 435, 120 S.Ct. 1479, 1490.

If a petitioner's claim is based on evidence that existed at the time of the state court's evidentiary hearing, and any lack of evidence "stems directly from [the petitioner's] failure to diligently develop it, [the petitioner's claim] claim does not involve 'a factual predicate that could not have been previously discovered through the exercise of due diligence,'" and no hearing is necessary. Hall v. Head, 310 F.3d 683, 698 (11th Cir. 2002) (affirming denial of evidentiary hearing when: federal habeas corpus petitioner was afforded an evidentiary hearing in his state habeas corpus proceeding; his counsel had "plenty of time and opportunity to prepare for the state habeas corpus hearing"; and the state habeas court afforded petitioner ample opportunity to develop evidence at the day-long state hearing); see also Isaacs, 300 F.3d at 1249-50 (affirming denial of evidentiary hearing to federal habeas corpus petitioner who sought a hearing in order to reconstruct the prayer with which his trial began, when petitioner was allowed during state habeas corpus proceedings to "present evidence concerning the contents of the invocation . . . at which time he was able to question several of the relevant participants from his trial.").

Finally, even if a petitioner is able to meet the requirements of § 2254(e) as outlined above, a Court need not grant an evidentiary hearing if such a hearing would not assist in the resolution of petitioner's claim. Breedlove, 279 F.2d 952, 960 (citing Bolender v. Singletary, 16 F.3d 1547, 1555 n. 9 (11th Cir. 1994)).

IV. Analysis

A. Unconstitutional Conflict of Representation (Claim V)

In his federal habeas corpus petition, petitioner alleges that he was "denied a fair adversarial testing of his convictions and sentence when his attorney were forced into an actual conflict of interest in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." Doc. 2 at 25. In particular, petitioner claims

that the fact that the trial court appointed "new counsel to raise the ineffectiveness of trial counsel while trial counsel was representing [petitioner] at the motion for new trial and on direct appeal created intractable conflicts and ethical dilemmas that hampered the effectiveness of both trial counsel and new counsel." Id. at 29. Petitioner believes that "he was denied the effective assistance of counsel at motion for new trial and on direct appeal as a result of an actual conflict of interest created by the trial court's dual appointment." Id. at 36.

Having thoroughly reviewed petitioner's motion for an evidentiary hearing along with all the evidence offered in support thereof, the Court concludes that none of petitioner's proffered evidence would affect the resolution of his conflict of interest claim.[5] Petitioner submitted a ninety-nine page memorandum in support of his motion for an evidentiary hearing. See Doc. 38. Nowhere in these ninety-nine pages does petitioner point to any evidence supporting the existence of a conflict of interest between his counsel. Rather, he refers to this claim only once, when he states, "[A]s for federal habeas claims Five and Eight, Mr. Davis contends that he should be allowed to present evidence on the claim that he was denied the effective assistance of counsel at motion for new trial and direct appeal because of an actual conflict of interest." Id. at 95. Similarly, none of the fifty-eight appendices to petitioner's motion present evidence relevant to petitioner's conflict of interest claim.

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[5] In his motion for an evidentiary hearing, petitioner did not specify which pieces of evidence supported a hearing with respect to which claim. See Doc. 38. Rather, petitioner discussed all of his evidence, and then contended that a hearing was warranted on all four claims. See id. Accordingly, the Court was forced to make an independent determination of which evidence was offered in support of which claim. As discussed above, none of the evidence presented was relevant to petitioner's conflict of interest claim.

Accordingly, the Court DENIES petitioner's motion for an evidentiary hearing with respect to his conflict of interest claim (Claim V). See Breedlove, 279 F.2d 952, 960 (although an evidentiary hearing would not be barred pursuant to § 2254(e)(2), it would still be appropriate to deny petitioner an evidentiary hearing "'if such a hearing would not assist in the resolution of this claim.'" (citing Bolender v. Singletary, 16 F.3d 1547, 1555 n. 9 (11th Cir. 1994) ("[N]o evidentiary hearing is necessary where the proffered evidence would not affect the resolution of the claim.")).

B. Unconstitutional Absence from Critical Stages (Claim VIII)

In his federal habeas corpus petition, petitioner alleges that his "absence from critical stages of the proceedings violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and prejudiced his right to a fair trial." Doc. 2 at 61. In particular, petitioner contends that he was not present when Dorothy Ferrell was recalled for questioning after the close of evidence but prior to closing arguments. Id.[6] As discussed above, Ms. Ferrell stated in her affidavit that she did not see petitioner in the courtroom during her second trial appearance in which she discussed the phone call to defense counsel's home the night before. See Doc. 38, App. 27. Because petitioner has pointed to evidence relevant to his "absence" claim, the Court now considers

[6] Petitioner also contends that he was not present at a pre-trial hearing determining whether his case would be bound over to the superior court for trial, and for many bench conferences. Id. at 65-66. Petitioner, however, has offered no evidence in support of his motion for an evidentiary hearing relevant to these two contentions. The Court therefore denies petitioner's motion with respect to these two contentions and considers only whether petitioner is entitled to a hearing on his claim that he was absent when Ms. Ferrell was recalled to testify. See Breedlove, 279 F.2d 952, 960.

petitioner's motion with respect to this claim pursuant to the AEDPA.

To determine whether petitioner has "failed to develop the factual basis of [his] claim" in the state court proceedings pursuant to AEDPA § 2254(e), the Court first must ask "whether the factual basis was indeed developed in state court, a question susceptible, in the normal course, of a simple yes or no answer." Michael Williams, 529 U.S. 420, 431, 120 S.Ct. 1479, 1487. Here the answer is no. At the state habeas corpus hearing, the only testimony offered with respect to petitioner's "absence" claim was the testimony of Mr. Falligant (one of petitioner's trial counsel) that, with the exception of the preliminary hearing, petitioner was always in the courtroom. Davis v. Turpin, 94-v-162, Dec. 16, 1999 Hr'g Tr. At 135, 179.[7] Accordingly, as found by the state habeas corpus, petitioner failed to establish a factual predicate for his claim that he was absent from Ms. Ferrell's second appearance during trial. See Davis v. Turpin, 94-v-162, Sept. 9, 1997 Order at 17.

The Court next considers whether petitioner made a reasonable attempt, in light of information available at the time, to investigate and pursue his claims in state court. Michael Williams, 529 U.S. 420, 435, 120 S.Ct. 1479, 1490. The Court concludes that petitioner did not. Petitioner was aware of his "absence" claims as soon as his alleged absence occurred-during trial. He had ample time and opportunity to develop such testimony or evidence as the evidentiary hearing occurred more than three and a half years after his original petition for habeas corpus and more than five years after trial. Petitioner had ample opportunity to present the factual basis

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[7] Petitioner relied only on the following court reporter notation on page 1481 of the trial transcript: "(Note: Court was in recess at 10:15 p.m. [sic], and at 2:20 p.m., the following transpired outside the presence of the jury, and with defendant not yet present in the courtroom as follows:)."

for his "absence" claim at the state court's evidentiary hearing, and yet failed to do so.

The Court therefore finds that petitioner's failure to present evidence in support of his "absence" claim must be attributed to petitioner's lack of diligence during the state court proceedings. Accordingly, petitioner's "absence" claim does not involve a factual predicate that could not have been previously discovered through the exercise of due diligence. See Isaacs, 300 F.3d at 1249-50; Hall, 310 F.3d 683, 698 ("because Hall's ineffective assistance of counsel claim is based on evidence that existed at the time of the state hearing, and that any lack of evidence stems directly from Hall's failure to diligently develop it, Hall's claim does not involve 'a factual predicate that could not have been previously discovered through the exercise of due diligence.'"). Moreover, because his own trial counsel has testified under oath that petitioner was, in fact, present when Ms. Ferrell was recalled for questioning, petitioner has not demonstrated that, pursuant to § 2254(e)(2)(B), "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." See Davis v. Turpin, 94-v-162, Dec. 16, 1999 Hr'g Tr. At 135, 179.

Because petitioner failed to develop his "absence" claim in state court, has not alleged that his "absence" claim relies on a new rule of constitutional law, has not presented a factual predicate which could not have been previously discovered through the exercise of due diligence, and has not demonstrated that, but for constitutional error, no reasonable factfinder would have found him guilty, petitioner is not entitled to an evidentiary hearing on his "absence" claim. 28 U.S.C. § 2254(e)(2); Breedlove, 279 F.3d 952, 959-60 (§ 2254(e) requires habeas petitioners to be diligent in presenting the factual bases of their federal claims to state courts, and . . . a failure to do so will result in the denial of an evidentiary hearing in federal court (unless the statute's other

stringent requirements are met)."); see also Michael Williams, 529 U.S. 420, 437, 120 S.Ct. 1479, 1491 ("Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings."). The Court thus declines to hold an evidentiary hearing with respect to petitioner's "absence" claim.

C. State Misconduct (Claim IV)

In his federal habeas corpus petition, petitioner alleges that "the state withheld material exculpatory evidence, and false testimony was presented, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." Doc. 2 at 19. In particular, petitioner points to: the state's presentation at trial of Kevin McQueen's testimony that petitioner had confessed to the shooting of Officer McPhail; the state's failure to disclose until after the close of evidence in petitioner's trial that Dorothy Ferrell previously had contacted the district attorney's office about obtaining assistance in return for her testimony in petitioner's case; and the conduct of law enforcement officers in interviewing witnesses. See id. at 19-24. In support of his motion for an evidentiary hearing on this claim, petitioner has submitted the affidavits of Ms. Ferrell and Messrs. McQueen, Holmes, Young, Williams and Collins.

At the state habeas hearing, petitioner offered the December 6, 1996 affidavit of Kevin McQueen in support of his claim that the state had presented false evidence. Petitioner offered no evidence in support of his contentions that law enforcement improperly pressured witnesses or that the district attorney's office improperly failed to disclose its contacts with Ms. Ferrell.

1. Withholding of information and pressuring witnesses

To determine whether petitioner has "failed to develop the factual basis of [his] claim" in the state court proceedings pursuant to AEDPA § 2254(e), the Court first must ask

"whether the factual basis was indeed developed in state court, a question susceptible, in the normal course, of a simple yes or no answer." Michael Williams, 529 U.S. 420, 431, 120 S.Ct. 1479, 1487. Here the answer is no. As discussed above, it appears that petitioner offered no factual basis at the state habeas corpus hearing for his contention that the state withheld information and pressured witnesses, and thus failed to develop a record in support of such claim.

The Court next considers whether petitioner made a reasonable attempt, in light of information available at the time, to investigate and pursue his claims in state court. Michael Williams, 529 U.S. 420, 435, 120 S.Ct. 1479, 1490. The Court concludes that petitioner did not. Petitioner was aware of his claims with respect to Ms. Ferrell as soon as she made her second appearance during petitioner's trial. He raised such claims in his motion for new trial, on direct appeal and in his state habeas proceeding. Similarly, petitioner was aware of his "pressuring witnesses" claim at the time of trial because, as discussed above, several witnesses testified at trial that they had been pressured by law enforcement officers with respect to making their statements and identifying petitioner.[8] See also Wells Aff. At 20 ("I have had an opportunity to review affidavits gathered by Mr. Davis' counsel after I left the Resource Center and withdrew from the case. The information contained in these affidavits dealing with manufactured testimony on the part of State witnesses, additional information incriminating Sylvester Coles, and evidence otherwise pointing to Mr. Davis' innocence and/or other mitigating factors is precisely the information I believed was available to support Mr. Davis' constitutional claims for relief-and which was available at the time of Mr. Davis' trial.").

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[8] In addition to Mr. Collins, Benjamin and Craig Young also testified at petitioner's trial that the police had pressured them into making statements. See Trial Tr. At 1200-1214.

Petitioner, clearly aware of his claim, had ample time and opportunity to develop evidence in support of such claim, as the evidentiary hearing occurred more than three and a half years after his original petition for habeas corpus and more than five years after trial. Petitioner had ample opportunity to present the factual basis for his withholding of information and pressuring of witnesses claims at the state court's evidentiary hearing, and yet failed to do so.

The Court therefore finds that petitioner's failure to present evidence in support of his withholding of information and pressuring of witnesses claim must be attributed to petitioner's lack of diligence during the state court proceedings. Accordingly, such claims do not involve a factual predicate that could not have been previously discovered through the exercise of due diligence. See Isaacs, 300 F.3d at 1249-50; Hall, 310 F.3d 683, 698. Because petitioner failed to develop in state court his claims that the state improperly withheld information and pressured witnesses, has not alleged that such claims rely on a new rule of constitutional law and has not presented a factual predicate which could not have been previously discovered through the exercise of due diligence, petitioner is not entitled to an evidentiary hearing on his withholding of information and pressuring of witnesses claim. 28 U.S.C. § 2254(e)(2); Breedlove, 279 F.3d at 959-60; see also Michael Williams, 529 U.S. 420, 437, 120 S.Ct. 1479, 1491. Consequently, even if petitioner could "establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense," 28 U.S.C. § 2254(e)(2)(B), petitioner nevertheless is not entitled to an evidentiary hearing. See 28 U.S.C. § 2254(e)(2) (requiring petitioner to meet (A)(i) or (ii) *and* (B)).

2. Offering false testimony

At the state evidentiary hearing, petitioner offered into evidence Kevin McQueen's December 6, 1996 affidavit stating that petitioner had not, in fact, confessed to shooting Officer McPhail. Petitioner seeks an evidentiary hearing to

further develop his claim that the state unconstitutionally offered false testimony when it called Mr. McQueen to the stand. While the state habeas court admitted such affidavit for the purpose of taking it under consideration, the state court apparently did not consider it because the state court concluded that petitioner's state misconduct claim, other than as it related to Ms. Ferrell, had been procedurally defaulted. See Davis v. Turpin, 94-v-162, Dec. 16, 1996 Hr'g Tr. at 92; Sept. 9, 1997 Order at 1, 30-31. Petitioner offered no other evidence, and no testimony, in support of his false testimony claim.

The Court finds that even though petitioner presented Mr. McQueen's affidavit at the state court's evidentiary hearing, petitioner nevertheless is not entitled to a hearing with respect to his false testimony claim. In reaching this conclusion, the Court finds instructive the Eleventh Circuit's analysis in Isaacs v. Head. In Isaacs, the Eleventh Circuit considered whether a district court properly had denied a habeas petitioner's motion for an evidentiary hearing in order to reconstruct the prayer with which his trial began. In finding that the district court did not err in denying the petitioner's motion, the Eleventh Circuit stated as follows:

> As the district court pointed out, Isaacs was aware of the failure to record the prayer at least by the time of his direct appeal. He had opportunities to reconstruct the contents of the prayer both during the new trial proceedings, which were conducted more than five months after his conviction and sentence, and again when the Georgia Supreme Court remanded the case to the trial court to permit the reconstruction of another portion of the record. On both occasions he failed to do so. Isaacs was also allowed to present evidence concerning the contents of the invocation during state habeas proceedings, at which time he was able to question several of the relevant

> participants from his trial. Therefore, we believe that any failure to reconstruct the contents of the prayer at this stage, over 10 years after he became aware of the omission from the trial transcript, must be attributed to Isaacs' lack of diligence during the state court proceedings.

Isaacs, 300 F.3d at 1249-1250.

In the case at bar, petitioner was aware of the alleged false testimony as soon as it was uttered by Mr. McQueen at petitioner's trial. He had ample time and opportunity to develop the factual basis of his false testimony claim during his motion for new trial, on direct appeal and during his state habeas corpus proceedings. At the state evidentiary hearing, more than three and a half years after his original petition for habeas corpus and more than five years after trial, petitioner was unrestricted in his ability to present evidence and call witnesses concerning such alleged false testimony. Petitioner, however, chose to present only on the affidavit of Mr. McQueen. Petitioner did not call Mr. McQueen, or any other witnesses, to testify with respect to this claim.

As evidenced by the date of Mr. McQueen's affidavit, petitioner was in contact with Mr. McQueen within ten (10) days of the date of the state court hearing. Petitioner's failure to obtain more information from Mr. McQueen than contained in his affidavit, or to subpoena Mr. McQueen or other witnesses to further explore at the state evidentiary hearing the substance of petitioner's false testimony claim, constitutes a failure to further develop the factual basis of his claim. Accordingly, the Court finds that any failure to further develop his false testimony claim by this stage, more than eleven years after he became aware of McQueen's alleged false testimony at trial, must be attributed to petitioner's lack of diligence during the state court proceedings.

Applying § 2254(e)(2)(A)(ii), the Court finds that because petitioner's false testimony claim is based on evidence that existed at the time of the state hearing, and because any lack of evidence stems directly from petitioner's failure to diligently develop it, petitioner's false testimony claim does not involve "a factual predicate that could not have been previously discovered through the exercise of due diligence." See Hall v. Head, 310 F.3d at 698. Because petitioner failed to develop in state court his claim that the state presented false testimony, has not alleged that such claim relies on an new rule of constitutional law, and has not presented a factual predicate which could not have been previously discovered through the exercise of due diligence, petitioner is not entitled to an evidentiary hearing on his false testimony claim. 28 U.S.C. 2254(e)(2); Breedlove, 279 F.3d at 959-60; see also Michael Williams, 529 U.S. 420, 427, 120 S.Ct. 1479, 1491. Consequently, even if petitioner could "establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense," 28 U.S.C. § 2254(e)(2)(B), petitioner nevertheless is not entitled to an evidentiary hearing. See 28 U.S.C. § 2254(e)(2) (requiring petitioner to meet (A)(i) or (ii) *and* (B)). The Court thus declines to hold an evidentiary hearing with respect to petitioner's false testimony claim.

The Court does, however, regard the affidavit of Mr. McQueen, admitted by the state habeas court for consideration, to be a part of the record in this federal habeas corpus action. In the event that the Court determines that petitioner's false testimony claim has not been procedurally default, see Doc. 21, the Court shall consider Mr. McQueen's affidavit when reaching the merits of petitioner's claim.

D. Petitioner's Ineffective Assistance Claim (Claim VI)

Petitioner contends that he was denied effective assistance of counsel at trial, in his motion for new trial and on direct appeal. See Doc. 2 at 37. Specifically, he faults

counsel for having failed to present evidence that petitioner did not shoot Michael Cooper at the Cloverdale party-in order to counter the state's theory of a link between the Cloverdale shooting and the shooting of Officer McPhail-and for having failed to present evidence to support petitioner's theory that Red Coles shot Officer McPhail. Id. at 37-38.[9]

In support of his motion for an evidentiary hearing on this claim, petitioner has submitted the affidavits of Joseph Washington, Tonya Johnson, Joseph Blige, April Hester and Lamar Brown, which he presented at the state habeas corpus evidentiary hearing. These affidavits indicated that: Red Coles was at the Cloverdale party (April Hester); Red had a gun on the night in question (Tonya Johnson); Red looked nervous after the shooting of Officer McPhail (April Hester); and that petitioner did not have a conflict with Michael Cooper at the Cloverdale party (Joseph Blige and Lamar Brown). Additionally, Joseph Washington stated, as he testified at petitioner's trial, that Red Coles shot Officer McPhail. Petitioner also offers for the first time in this federal habeas corpus proceeding the affidavits of Harriet Murray, Anthony Hargrove, Shirley Riley, Darold Taylor, Gary Hargrove, Abdus-Salam Karim, Anita Dunham Saddler, D.D. Collins, and April Hester Hutchinson, which further support his theory that petitioner did not shoot Officer McPhail and suggest that Red Coles has confessed to having shot Officer McPhail.

At the state habeas corpus hearing, petitioner did not call Washington, Blige, Brown, Johnson or Hester to testify. Although the state habeas court admitted their affidavits for the purpose of taking them under consideration, the state court apparently did not consider the substance of such

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[9] While petitioner alleges ineffective assistance based on many other actions and inactions of counsel, see Doc. 2 at 50-57, his motion for an evidentiary hearing on his ineffective assistance claim relates only to his contention that he did not shoot either Michael Cooper or Office McPhail. See Doc. 38.

affidavits in ruling on petitioner's habeas corpus petition. See Davis v. Turpin, 94-v-162, Dec. 16, 1996 Hr'g Tr. At 84, 87, 92-97; Sept. 9, 1997 Order.[10]

The Court finds that even though petitioner presented several affidavits at the state court's evidentiary hearing, petitioner nevertheless is not entitled to a hearing with respect to his ineffective assistance claim. In reaching this conclusion, the Court again finds instructive the Eleventh Circuit's analysis in Isaacs v. Head, which the Court discussed with respect to Kevin McQueen, above See Isaacs, 300 F.3d at 1249-1250.

In the case at bar, petitioner argued at the time of trial that Red Coles, and not petitioner, shot Officer McPhail, and presented trial testimony to that effect. Petitioner had ample time and opportunity to develop the factual basis of his ineffective assistance claim during his state habeas corpus proceedings. See Sept. 9, 1997 Order at 41 ("Although the failure to discover, admit or effectively argue the importance of [exculpatory] items of evidence would appear to place this case in the category of a case of 'mistaken identity,' the court finds from a review of the record that many pieces of evidence supporting a finding that Coles was the shooter or highlighting inconsistencies in the testimony of witnesses who identified Davis as the shooter were indeed presented to the jury during Davis' trial.").

At the state evidentiary hearing, more than three and a half years after his original petition for habeas corpus and

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[10] The state habeas court found that petitioner's claim of ineffective assistance at trial was procedurally barred. See Davis v. Turpin, 94-v-162, Sept. 9 Order at 8. The state court did, however, consider petitioner's claim of ineffective assistance at motion for new trial and on appeal and found, generally, "that appellate counsel was effective in raising those issues [regarding exculpatory evidence] which were of benefit to [petitioner] and that their performance was not deficient." Id. at 16.

more than five years after trial, petitioner was unrestricted in his ability to present evidence and call witnesses concerning his own innocence and Mr. Coles's guilt. Petitioner, however, chose to present only the affidavits mentioned above, and did not call any of the affiants to testify with his respect to his contention that Red Coles was the responsible party.

Petitioner's failure to obtain more information from the affiants than contained in their affidavits, or to subpoena the affiants or other witnesses to further explore at the sate evidentiary hearing the substance of petitioner's "actual innocence" claim constitutes a failure to further develop the factual basis of his claim. Accordingly, the Court finds that any failure to further develop his ineffective assistance claim by this stage, more than eleven years after he propounded his theory at trial that Red Coles shot Officer McPhail, must be attributed to petitioner's lack of diligence during the state court proceedings.

Applying § 2254(e)(2)(A)(ii), the Court finds that because petitioner's ineffective assistance claim is based on evidence that existed at the time of the state hearing, and because any lack of evidence stems directly from petitioner's failure to diligently develop it, petitioner's ineffective assistance claim does not involve "a factual predicate that could not have been previously discovered through the exercise of due diligence." See Hall v. Head, 310 F.3d at 698. Because petitioner failed to develop in state court his claim that his counsel was ineffective for failing to develop his theory that Red Coles shot Officer McPhail, has not alleged that such claim relies on a new rule of constitutional law, nor presented a factual predicate which could not have been previously discovered through the exercise of due diligence, petitioner is not entitled to an evidentiary hearing on his ineffective assistance claim. 28 U.S.C. 2254(e)(2); Breedlove, 279 F.3d at 959-60; see also Michael Williams, 529 U.S. 420, 437, 120 S.Ct. 1479, 1491. Consequently, even if petitioner could "establish by clear and convincing

evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense," 28 U.S.C. § 2254(e)(2)(B), petitioner nevertheless is not entitled to an evidentiary hearing. See U.S.C. § 2254(e)(2) (requiring petitioner to meet (A)(i) or (ii) *and* (B)). The Court thus declines to hold an evidentiary hearing with respect to petitioner's ineffective assistance claim.

The Court does, however, regard the affidavits of Ms. Hester, Ms. Johnson, and Messrs. Blige, Brown and Washington, admitted by the state habeas court for its consideration, to be a part of the record in this federal habeas corpus action. In the event that the Court determines that portions of petitioner's ineffective assistance claim have not been procedurally defaulted, see, Doc. 21, the Court shall consider such affidavits when reaching the merits of petitioner's ineffective assistance claim.

E. Petitioner's contention that a lack of funding at the state habeas level excuses his failure to develop his claims in the state habeas proceedings

As he did in support of his motion for discovery (see Doc. 29), petitioner again argues that his failure to develop his claims in the state habeas corpus proceedings was due not to a lack of diligence, but rather to lack of funding. See Doc. 38 at 79-86. The Court again rejects this argument and finds, as noted herein, that petitioner has not demonstrated the requisite diligence to overcome his failure to develop, or further develop, the factual basis of his claims during the state habeas corpus proceedings. He clearly was aware of such claims, as is evidenced by his amended state habeas corpus petition. See Davis v. Turpin, 94-v-162, Am. Pet. For Writ of Habeas Corpus at 17-36 (discussing petitioner's contentions that: Red Coles committed the relevant murder; the testimony offered at trial by Dorothy Ferrell and Darrell Collins had been severely undermined; a "wealth of information existed that could have discredited" many of the state's witnesses; and that evidence favorable to petitioner

was not presented at trial). Petitioner has not explained to the Court's satisfaction why he did not employ his subpoena power to call as witnesses at the December 1996 evidentiary hearing any of the affiants discussed herein, or why he did not prepare the newly submitted affidavits prior to such hearing.

Finally, as petitioner has conceded, Georgia does not provide counsel in state habeas corpus proceedings to inmates who have been sentenced to death. See Gibson v. Turpin, 270 Ga. 855, 513 S.E.2d 186 (Ga. 1999). As the state habeas court noted, absent the right to appointment of counsel, it necessarily follows that habeas petitioners have no right to an award of funds for the expenses incurred by counsel in pursuing the habeas petition. See Davis v. Turpin, 94-v-162, Sept. 9, 1997 Order at 42, citing State v. Davis, 246 Ga. 200, 201-02 (Ga. 1980). Until the appropriate legislative body provides otherwise, the Court therefore cannot find that a lack of funds excuses a habeas petitioner's lack of diligence in state habeas corpus proceedings.

V. Petitioner's request for oral argument

Petitioner has requested that the Court exercise its discretion to allow oral argument with respect to petitioner's motion for an evidentiary hearing. See Doc. 42. Because the Court was able to rule on petitioner's motion for an evidentiary hearing on the pleadings, the Court therefore DENIES petitioner's request for oral argument (Doc. 42).

VI. Petitioner's motion for expert assistance

In its September 19, 2002 Order (Doc. 32), the Court reserved ruling on petitioner's motion for expert assistance until the Court was able to determine whether to hold an evidentiary hearing. Because the Court has denied petitioner's motion for an evidentiary hearing, it likewise DENIES petitioner's motion for expert assistance (Doc. 28). See Lawson v. Dixon, 3 F.3d 743, 753 (4th Cir. 1993) (holding that because petitioner was not entitled to an evidentiary hearing, there was no "reasonable necessity" for an expert's appointment); see also Cardwell v. Netherland,

971 F.Supp. 997, 1008 (E.D. Va. 1997) (experts not reasonably necessary if evaluations cannot be introduced); Burris v. Parke, 948 F.Supp. 1310, 1327 (N.D. Ind. 1996) (experts not reasonably necessary where evidence cannot be introduced because petitioner is not entitled to an evidentiary hearing), aff'd, 116 F.3d 256 (7th Cir. 1997).

VII. Scheduling Order

Petitioner may submit a pleading briefing the merits of his habeas corpus claims no later than thirty (30) days after the date of this Order. Respondent may submit a responsive pleading no later than sixty (60) days after the date of this Order. Neither party's pleading shall exceed sixty (60) pages. To be considered, each pleading must be file-stamped by the Clerk's office no later than 5:00 p.m. on the date such pleading is due. **No extensions shall be granted.**

The parties are instructed to brief the merits of all of petitioner's claims, including those claims that respondent believes to be procedurally defaulted.[11] The parties need not re-brief the issue of procedural default, however, as such issue ahs been fully presented. In their respective pleadings, the parties shall, to the extent possible, specify which evidence or legal argument is offered in support of, or in opposition to, which claim.

So ORDERED.

s/ JOHN F. NANGLE
UNITED STATE DISTRICT JUDGE

Date: March 10, 2003

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[11] The Court has not yet determined whether any of petitioner's claims have been procedurally defaulted, or whether any procedural default has been excused.